LEGISLATIVE UPDATE

COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

FEBRUARY 2003, NO. 16 — DEPARTMENT OF PUBLIC ADVOCACY

Department of Public Advocacy Funding in Jeopardy

Cases To Be Turned Back to the Court

The Crisis

The Kentucky public defender system is in serious trouble as 2003 begins. Trial level caseloads rose 7% in FY02; they have risen an annual rate of 6% during the first quarter of FY03. 26 positions were not funded in the Governor's Spending Plan for FY03. DPA's 3% budget reduction in FY02 became DPA's base for FY03. Now a 2.6% budget decrease looms for FY03, and 5.2% for FY04. If this occurs, Kentucky's public defender system will not be able to meet its constitutional mission.

Providing for Public Defense is a Constitutional Obligation of Government

"In our adversary system, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Gideon v. Wainwright*, 372 U.S. 335 (1963). This United States Supreme Court case established the absolute constitutional responsibility of government to provide counsel to indigents accused of crime anywhere in the United States. This was recently reaffirmed in *Alabama v. Shelton*, 535 U.S. 654 (2002).

The responsibility of state government to fund indigent defense is clear. "Government has the responsibility to fund the full cost of quality legal representation for all eligible persons…" ABA *Standards for Criminal Justice: Providing Defense Services*, 3d. Ed. (1992). "Indigent defense is a necessary function of government, and an essential and coequal partner in the criminal justice system." *Blue Ribbon Group Report, Recommendation #1* (1999).

The Department of Public Advocacy has no control over its workload, a circumstance that is different from many other public agencies. Public defenders are assigned their cases from court appointments. Courts are presented with persons who have been arrested by law enforcement. Once appointed, public defenders have no control over the number of cases they must handle. Their workload is determined by the appointments made by the court, and by the laws passed by the General Assembly.

In January of 2003, the state's constitutional responsibility of providing funding for indigent defense is being tested by a severe budget shortfall in the Commonwealth of Kentucky. Unfortunately, as the economy has soured, and as resources have declined, the need for services such as prison beds and indigent defense rise. Indigent defense should be viewed as mandatory much like providing space and services for sentenced inmates. If Kentucky must accommodate to the rising numbers of inmates by providing necessary funding, so too must Kentucky provide additional funding to provide for the increased caseloads of Kentucky public defenders.

Until 2000, Public Defense was Chronically Underfunded in Kentucky

The Department of Public Advocacy, the agency solely responsible for supplying lawyers to persons unable to afford counsel who have been charged with crimes, has been underfunded on a chronic basis for two decades. The documentation of the chronic underfunding has been clear.

Early in the 1990s, indigent defense was again in crisis. A *Task Force on the Delivery and Funding of Quality Public Defender Services* was created by Governor Jones. One of the recommendations that Task Force made in its 1995 Report was that "additional funds were needed to enable the Department of Public Advocacy to meet its state and federal constitutional mandates." Unfortunately, little additional funding was made available in response to the Task Force Report.

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By 1998, the situation for Kentucky public defenders had not improved. Indeed, the ABA Bar Information Project Report issued in January of 1998 stated that few of the problems addressed by the 1995 Task Force Report had been addressed. The 1998 Report stated that DPA has "lurched from biennium to biennium in a 'patch-work, finger in the dike' approach…." Foremost among the problems was increasing caseloads and the lack of resources to address those caseloads. "[O]vershadowing all of the problems facing and the solutions proposed by DPA is that of burgeoning caseloads. Over the past decade DPA's caseloads have increased dramatically, while funding has failed to keep pace…it is clear that the DPA numbers far exceed those contemplated by the National Advisory Commission."

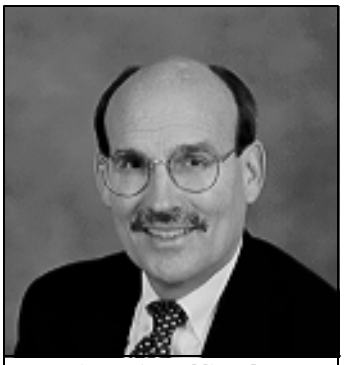
The 1998 General Assembly in response to the ABA/BIP Report placed $2.3 million into DPA's General Fund budget which allowed 5 new full-time offices to open, starting a process toward completing the full-time system. Beginning in 1998, progress was finally occurring in the funding picture for the Department.

The Blue Ribbon Group

In 1999, a group of 22 prominent Kentucky citizen leaders led by Robert Stephens and Mike Bowling once again addressed the problem of inadequate funding for Kentucky's public defenders. A review of their findings and recommendations demonstrates the state of indigent defense at that time. *The Blue Ribbon Group* found that the Department "ranks at, or near, the bottom of public defender agencies nationwide in indigent cost-per-capita and cost-per-case." Finding #5: "The DPA per attorney caseload far exceeds national caseload standards." Finding #7: "[O]verall the DPA is underfunded." Recommendation #2: "The Kentucky public defender system cannot play its necessary role for courts, clients, and the public in this criminal justice system without a significant increase in funding." Recommendation #12: "The $11.7 million additional funding for each of the 2 years is reasonable and necessary to meet DPA's documented funding needs…" *The Blue Ribbon Group* looked into the future, and found that "without substantial additional funding, there is a likely risk that the Commonwealth of Kentucky could not adequately defend a statewide systemic lawsuit due to the inadequate resources and overwhelming caseload."

In response, and following the endorsement of the *Blue Ribbon Group* recommendations by the Kentucky Criminal Justice Council, Governor Patton set out to fund the *Blue Ribbon Group* recommendations in two installments. In the FY01-02 biennium, the Governor placed $4 million and $6 million into DPA's General Fund. It was anticipated that the remaining $5.7 million to was to be funded during the FY03-04 biennium.

The General Assembly passed the Governor's budget in 2000 and DPA was able to make substantial progress. Counties covered by a full-time office rose from 47 in 1996 to 112 by January of 2003. Starting salaries for defenders rose from $23,000 to $34,000. Caseloads were reduced somewhat. Significant progress was made, with the hope that the *Blue Ribbon Group* recommendations could be completed by the 2002 General Assembly.



Ernie Lewis, Public Advocate

Budget Reductions in FY01, 02, and 03 Have Reduced DPA's Ability to Meet its Primary Mission

While DPA has been making significant progress during the past biennium, DPA's budget has been reduced in each of the last 2 years. In FY01, $447,000 was cut from DPA's budget. In FY02, DPA was cut another 3%. The Department's General Fund, which had experienced $10 million in additional funding over the biennium, had been permanently reduced by 4%.

Most significantly, the 2002 General Assembly did not fund the remaining $5.7 million recommended by the *Blue Ribbon Group*. Instead, the budget passed and ultimately placed into the Governor's Spending Plan flat-lined DPA's budget at the level reflected by the 3% cut in FY02. 26 of DPA's positions were not funded. Of course, the obligations represented by those 26 positions were not taken away. Cases continued to flow into those offices where the 26 unfunded positions were located.

Despite the budget shortfall, prosecutors did not have their budgets reduced. Prosecutors did not have their budgets reduced in FY01, and in FY03 & 04, their funding levels increased by over $5 million. Of course, prosecutors and public defenders are responsible for the most of the same cases (90% of the cases handled by Commonwealth's Attorneys are also handled by DPA), and must adapt to the same trends.

One other development must also be considered as part of this context. Family courts have been developing throughout the Commonwealth. These present additional cases, new and sometimes simultaneous dockets that have been creating scheduling nightmares for DPA's offices. While the court system receives additional funding for family courts, DPA has received no new funding to cover these new courts. As a result of the November election, family courts will continue to be created.

Caseloads Continue to Increase

It has previously been noted that public defenders have little or no control over their caseloads. Caseloads continue to rise for Kentucky public defenders even while resources have been declining. In FY01, full-time trial attorneys averaged 420 new open cases per lawyer per year. That rose to 435 in FY02 (a 3.6% increase). As of the end of the first quarter of FY03, that figure was up to 459, an additional 5.5% increase.

Worse, 9 full-time defender offices now have caseloads of over 500 cases per lawyer as of the end of the first quarter of FY03.

These caseloads should be understood in the context of national standards. The well-accepted National Advisory Commission on Criminal Justice Standards and Goals (NAC) standards recommend no more than 150 felonies, or 200 juvenile cases, or 400 misdemeanors handled by a single public defender in a single year. Kentucky's mixed case average of 459 would be excessive were DPA's lawyers handling nothing but misdemeanors. *The Blue Ribbon Group* recommended no more than 450 cases per lawyer in the urban offices and no more than 350 per lawyer in rural offices. Rural offices constitute the great majority of Kentucky's public defender system.

The ABA *Standards for Criminal Justice: Providing Defense Services*, 3rd. Ed. (1992), Standard 5-5.3 states that "(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases."

The National Legal Aid and Defender Association passed "The 10 Principles of a Public Defense Delivery System" to aid policy-makers in their decision-making. This was adopted by the A*merican Bar Association's House of Delegates in February 2002*. Principle #5 reads: "Defense counsel's workload is controlled to permit the rendering of quality representation." Principle #8 reads: "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system."

Excessive caseloads are present throughout the indigent defense system, including juvenile court. In September of 2002, in "Advancing Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings," by the ABA Juvenile Justice Center National Juvenile Defender Center and the Children's Law Center, Inc., it was noted that some defender caseloads in Kentucky were "far in excess of IJA/ABA Standards and the NLADA Standards…Effective representation is adversely effected in some parts of the state due to crushing caseloads."

The Effect of an Additional Budget Reduction

DPA will have to cut $622,058 for a 2.6% reduction in FY03, and $1,320,269 for a 5.2% reduction in FY04. Because of the previous budget reductions, and DPA's efforts to cut costs as much as possible, in each of the fiscal years DPA would be forced to reduce the level of our personnel by as many as 24 additional staff (or 6.1% of our staffing complement). The consequences of this will be significant. One attorney in each field office would have to be cut, raising the caseload for each remaining attorney significantly.

As DPA stated in its FY02 reduction plan, "DPA has very little flexibility when it comes to presenting a plan for reducing its budget. DPA's budget consists of virtually all personnel, in fact 89% of our budget. Reducing DPA's budget translates into reducing DPA's personnel. Yet, unlike most agencies, DPA cannot cut its services. DPA's services are constitutionally mandated. DPA cannot tell a court that it will provide 3% to 5% fewer services. When DPA has a staff attorney vacancy, DPA cannot tell the court to find another lawyer to provide the service and to use the court's resources; rather, DPA must provide the service."

Since the budget reduction cycle has begun, the Department of Public Advocacy has made every effort to reduce its operating costs to the point where we now believe there is nothing left to cut that will have no impact on our delivery of services. Our General Fund base has already been reduced by 4% (compounded) from FY01 through FY03, and we are currently operating without funding for 26 positions. These 26 positions are 6.7% of our staffing complement. The impact of those vacancies on individual attorney caseload has been significant, and is the source of much of the present crisis in caseload.

DPA no longer has vacancy credits that can be used to meet any reductions in General Funds. The fact that we do not have funding for 26 positions no longer allows this.

DPA began FY03 with a 3% reduced budget, and a 7.9% increase in caseload in FY02, and an additional 6% increase in caseload in the first quarter of FY03. After one quarter, DPA was at 33% of its budget. There was no room for any further budget cuts. Yet, we are now contemplating an additional budget reduction of 2.6% for FY03 and 5.2% for FY04. Budget reductions in this amount, in the context described above, would be devastating, making it next to impossible for the Department to meet its constitutional mission. $622,058 would have to be cut during this fiscal year; $1,320,269 would be cut in FY04.

In response to these cuts, DPA would have to respond in most if not all of the following way, in addition to the belt-tightening that has already occurred:

- Offices where the caseload is excessive would have to refuse to accept court appointments. Courts would be responsible for providing constitutionally required counsel to poor persons charged with crimes. This would require some compensation for the appointed private lawyers, as *Bradshaw v. Ball*, Ky., 487 S.W. 2d 294 (1972), makes the forced uncompensated representation of indigents an unconstitutional taking. Those 9 offices with caseloads in excess of over 500 cases per lawyer would be among those required to turn cases back to the Court of Justice. Offices where the 26 unfunded positions are located would also be required to reject court appointed cases. The total number would be 24 additional positions, or overall 50 positions out of a complement of fewer than

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400. The reduction in staff would be approximately 6.1% of our total complement, but 12.8% of our funded positions – at the same time that caseloads are increasing rapidly – a doubling of the impact to this agency.

- The of-counsel program would have to be ended, and cases formerly assigned to private appellate counsel would have to be turned back to the Court of Appeals.
- 2 lawyers handling juvenile appeals would have to be laid off or reassigned to vacant positions.
- 3 lawyers presently handling capital trial and post-trial cases would have to be laid off or reassigned.
- Library staff would have to be reduced by half. One additional person would have to be laid off from the Law Operations Division.
- Layoffs would occur in the Fayette Public Defender's Office.
- Significantly higher caseloads would be required to avoid layoffs in Louisville.
- DPA would be able to hire no law clerks, and would have to lay off those presently hired.
- The new office in Bullitt County would not be able to assist in addressing the recently identified backlog of cases.
- Significantly reduced hours for an advocate in the P&A Division, resulting in a higher workload for the remaining advocates. This is in addition to the present state of P&A, which as a result of their 2002 budget (where 54.9% of its General Fund was taken) have been unable to fill 2 positions.
- Attorneys would have to work unauthorized overtime in order to meet their ethical obligations, implicating appeals to the Personnel Board.

Implications and Consequences of this Level of Budget Reduction

The implications of budget reductions of the scope contemplated are profound.

- Turning cases back to the trial courts. This is a dramatic shift in public policy and would create immense disruption in the Court of Justice. It is anticipated that defenders would be held in contempt for refusing to take more cases than they could handle. Relationships developed over time with the Court of Justice would be poisoned. Dockets would be delayed. Private lawyers would be drafted into service, and lawsuits over being required to serve without compensation would be expected.
- Turning cases back to the Court of Appeals. The same impact would occur with the Court of Appeals. The Court has no resources for providing for private lawyers to handle indigent defense cases. Cases turned back to them would have to be handled, but by whom? With what funding?
- No coverage in Family Court. Family Courts have been established all over the Commonwealth. After the November election, their numbers will increase. Defenders are vital in Family Court, but will not be able to continue to represent clients there because DPA has received no funding whatsoever to cover Family Court.
- Laying off staff. DPA typically has approximately 20-25 vacant positions at any given time. In order to achieve a total vacancy level of 50, significant layoffs would have to occur.
- Continued excessive caseloads. The Kentucky Long-Term Policy Research Center's *Visioning Kentucky's Future: Measures and Milestones* (2002) stated that rising caseloads for Kentucky public defenders "can undermine the fundamental right of access to legal representation. Overburdened public defenders are less likely to be able to mount an effective defense, as legal counsel must have the time and opportunity to prepare adequately, as well as access to sufficient resources."
- Structural imbalance. There are many operational expenses over which DPA has no control, such as phone costs, rent, copier rentals, health care, etc. With no vacancy credits to apply, DPA will simply be unable to pay its bills to landlords, to the phone company, and other vendors.
- Innocent people will be imprisoned wrongfully. This is perhaps the most dramatic of the consequences. Quality defense is absolutely essential to our system of justice. Over 100 persons have been exonerated recently nationwide due to DNA demonstrating their innocence. 2 persons have been exonerated in Kentucky with DNA, one who spent 8 years for a rape he did not commit, and one who spent 12 years for a rape he did not commit. Policy makers must understand that higher caseloads and layoffs will lead to defenders without sufficient time to present an adequate defense, resulting in innocent persons being convicted for crimes they did not commit.
- Possible systemic lawsuit. *The Blue Ribbon Group Report* indicated that Kentucky was vulnerable to a systemic lawsuit if the $11.7 million was not added to DPA's funding level. It was not. Kentucky will return to the identified level of vulnerability if these budget reductions occur.
- Reduction of resources to capital defense. Layoffs or reassignments in the 3 capital branches will reduce the quality of services to those charged with and convicted of capital crimes. Kentucky's ? would no longer be able to have confidence in its delivery of representation in capital cases.
- The progress of the *Blue Ribbon Group* will have ended and been eliminated. The full-time system will not be completed. Caseloads will soar. The Kentucky indigent defense system will return to its past of "lurching" from one biennium to the next, from one crisis to the next.

The Full-Time System Can Be Completed and Excessive Caseloads Addressed

This crisis can and must be averted. DPA has only 8 counties left not covered by a full-time office. Offices in Boone and Harrison Counties were funded in HB 1. An office in Glasgow, to cover Barren and Metcalfe Counties, and an expansion of the office in Covington to cover Campbell County would

complete the full-time system. At that point in time, Kentucky would have all 120 counties by a system that is cost-efficient and one that can guarantee quality if adequately funded.

An additional attorney in each of the 9 offices in which caseloads are presently exceeding 500 per lawyer would bring those offices into ethical levels.

These significant improvements can occur if there is no budget reduction, and if the General Assembly authorizes the spending of money from HB452, the single Court Cost Bill. Revenue is coming in from the Court Cost Bill, of which DPA receives 3.5%, that would allow for the completion of the full-time system and addressing of the caseload crisis. The 2002 General Assembly intended the Court Cost Bill to provide some level of growth to the DPA in anticipation of increased numbers of cases. If revenue is required to be applied to a reduced General Fund budget, no additional growth as caseload rises can occur. These significant improvements cannot and will not occur if the 2.6% and 5.2% budget reductions are applied to the Department.

Kentucky is at a crossroads in its public defense delivery system. It can continue the progress made in completing the full-time system, in raising salaries, and in lowering caseloads, with a modest investment. Or, Kentucky can return its indigent defense system to the past where DPA was not able to meet its constitutional obligations due to chronic underfunding. ■ **Ernie Lewis, Public Advocate**

Kentuckians Express Support for Alternative Sentences

The explosion in the number of persons being incarcerated across the nation, a trend that has tripled prison populations during the last 20 years, has run into the hard reality of budget deficits. States throughout the country are considering alternatives to imprisonment in order to address serious budget shortfalls.

Kentucky has not been immune to this trend. On December 16, 2002, Governor Patton ordered the early release of non-violent offenders to offset Kentucky's budget shortfalls for the Department of Corrections. 567 non-violent Class D inmates who were nearing the completion of their sentences were ordered to be released. The Department of Corrections is contemplating further releases in order to maintain the felon population at the budgeted level.

A recent poll conducted by the University of Kentucky reveals that under certain circumstances, Kentucky citizens agree that alternative sentences for nonviolent felons is an appropriate sentence.

What do Kentuckians Think about Sentencing for Nonviolent Criminals?

For nonviolent criminals, a significant majority, 80%, of Kentuckians support a consequence other than prison that involves the supervision by a probation officer such as probation, community service, restitution to the victim, or mandatory treatment.

In Kentucky, the cost to taxpayers of keeping someone in prison is at least 10 times greater than the cost of a probation officer. It costs $1,333 on average to supervise a person who is on probation or parole. It costs between $13,084 - $26,774 per year to imprison a person, depending on their classification level.

The *Summer 2002 Kentucky Survey* conducted by the U K Survey Research Center surveyed 882 Kentuckians 18 years of age or older from July 20 to August 26, 2002 and included the following question: "If a person is convicted for a non-violent crime, what punishment do you believe is MOST appropriate: 1) A prison sentence, or 2) Some other consequence under the supervision by a probation officer such as probation, community service, restitution to the victim, or mandatory treatment." The results were:

	Percent
A prison sentence	20.5%
Some other consequence	74.2%
Don't Know	5.2 %

A second question was asked of those that were of the opinion that prison was the most appropriate punishment, "What if you knew that the cost to taxpayers of keeping someone in prison is on average 10 times greater than the cost of a probation officer?

Would you still believe the most appropriate punishment for a nonviolent offender is prison?" The results were:

	Percent
Yes, a prison sentence	66.9%
No, some other consequence	28.2%
Don't know	4.8 %

Consequently, of the 21% of those that believed prison was the most appropriate sentence for nonviolent criminals, 28% changed their mind when they understood the significant economic cost of imprisonment compared to supervised probation/parole.

That means that 80% of those polled believed for nonviolent criminals it most appropriate to have a consequence other than prison that involves the supervision by a probation officer such as probation, community service, restitution to the victim, or mandatory treatment.

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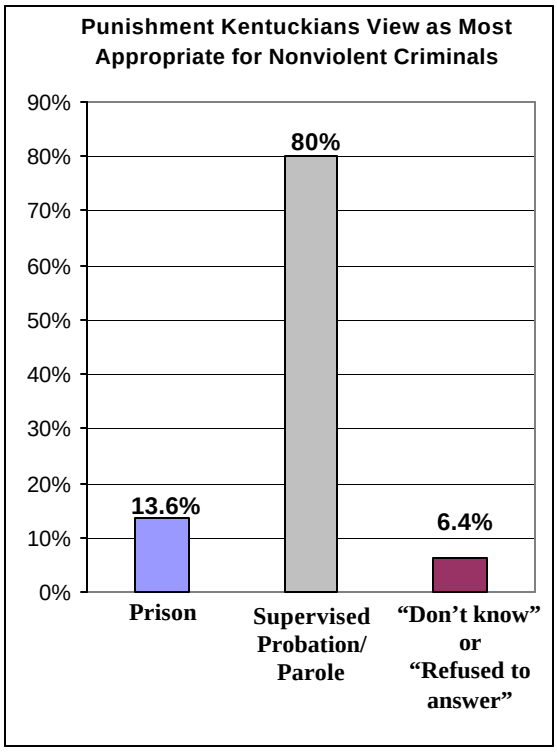


The margin of error for the survey is +/- 3.5% at the 95% confidence level.

The opinion of Kentuckians on what consequence there should be for nonviolent offenders is important for several reasons. First, it costs a lot to keep a nonviolent criminal in a *minimum* security prison, from $13,000 - $18,600 per year with an average per year cost of $14,500 compared to the $1333 yearly average for supervision by a probation and parole officer. See Corrections cost to incarcerate data at: http://www.cor.state.ky.us/Facts_n_Figures/cost0001.pdf

Second, Kentucky's criminal justice budget is $937 million, or 5% of the state's budget. Kentucky's budget now allocates, $324 million to corrections, which is 35% of the Kentucky criminal justice budget. It exceeds the budget for the Judiciary by $134 million.

Third, in 1998, The Kentucky General Assembly passed HB 455, the Governor's Crime Bill. That legislation made some significant assumptions. The fundamental assumption of House Bill 455 is that people who commit violent crimes should be incarcerated far longer than they were at the time. The corollary to that was that those who had committed nonviolent crimes should not necessarily be incarcerated. Unless nonviolent felons were given alternative sanctions, Kentucky was projected to face a dramatic fiscal time bomb in 10-20 years.

People who formerly were paroled on a life sentence in twelve years are now spending 20 years prior to parole. People who formerly were paroled on 40+ years in 12 years are now spending 85% of their time up to 20 years before being eligible for parole. At an average of $18,000-21,900 per inmate per year for medium to maximum security, this threatens to become a budgetary black hole.

House Bill 455 continues to be a riverboat gamble 5 years after its passage. The gamble is that:

- Kentucky circuit judges will utilize the sentencing provisions of HB 455 for nonviolent offenders in great numbers. HB 455 requires virtual mandatory probation for Class C and D felons, probation with an alternative sentencing plan, diversion, and prerelease probation;
- Kentucky prosecutors and criminal defense lawyers will be creative in looking to alternatives to incarceration. Prosecutors must recommend diversion, and they must resist opposing probation, probation with an alternative sentencing plan, and prerelease probation. Criminal defense lawyers must be excellent advocates for sentencing alternatives. They must utilize sentencing advocates to create alternatives to incarceration.
- Kentucky Probation and Parole Officers will be active in the development of the Presentence Investigation Report (PSI) to include references to recommendations for existing alternatives to incarceration. The Probation and Parole Department, however, has received little additional funding to take this required step. No one in the system is creating alternative sentencing plans tailor-made to the individuals.
- An entity will be developed to monitor the trends in the crime rate, the incarceration rate, the revocation rate, and make adjustments based upon those trends. The Kentucky Corrections Commission as recently reorganized is in the position to perform this function, but only if fully staffed and fully funded, which is not presently a reality.

Kentucky made a significant adjustment to its criminal justice system in HB455. Kentucky's prison population has continued to increase since its passage in 1998. More inmates need to be given alternative sentences at the front end, or there will be a need to release nonviolent felons at the back end when there are insufficient funds to continue to hold them. It is clear that if inmates are given alternative sentences, judges making those decisions have the support of the great majority of Kentucky citizens. ■

Ernie Lewis, Public Advocate
and Ed Monahan, Deputy Public Advocate

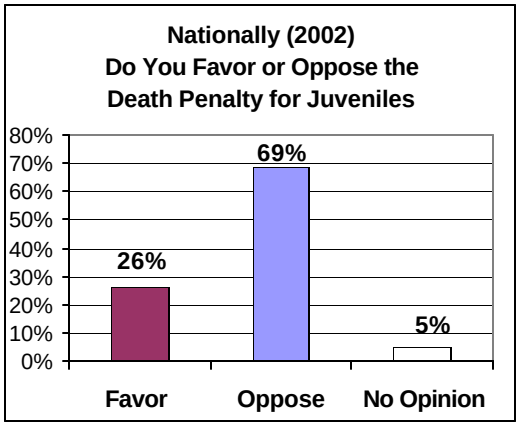
Juvenile Death Penalty Opinions, Nationally and in Kentucky

National Opinion in 2002

Nationally, support is low for the death penalty for juveniles. The Gallup Poll conducted from May 6-9, 2002 with 1,012 adults nationwide and a margin of error of ± 3 found:

"Do you favor or oppose the death penalty for Juveniles?"

Favor 26% Oppose 69% No Opinion 5%



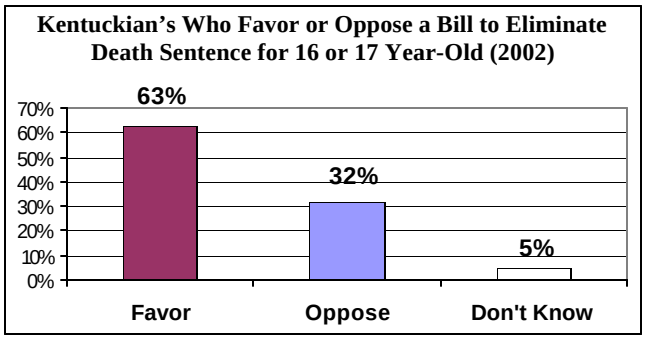
Opinions of Kentuckians in 1989, 2000 and 2002

The UK Survey Research Center has conducted two statewide polls asking in the Spring 2000 what sentence is preferred when an aggravated murder is committed by a 16 or 17 year old and in the Summer 2002 whether a bill to eliminate the death penalty in the 2003 General Assembly was favored or opposed.

Kentuckians support a bill to eliminate the death penalty for 16 and 17 year olds by a 2 to 1 margin. A significant majority of Kentuckians favor a bill in the 2003 General Assembly that would eliminate the death as a sentencing option for 16 and 17 year olds. On the recent Kentucky Survey, 63% of the respondents said they favored such a bill. 32% said they opposed such a bill. 5% said they had no opinion/did not know. While 21% strongly opposed such a bill almost twice as many Kentuckians, 37%, strongly favor it.

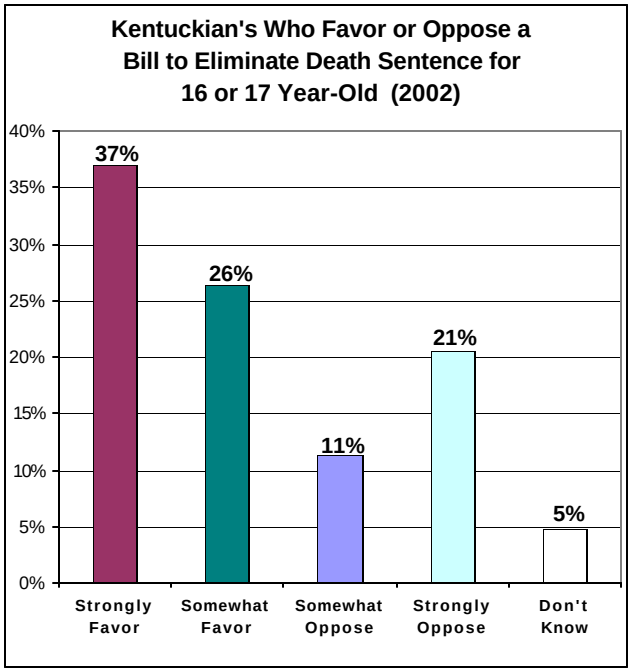
Current Kentucky Law

Kentucky law now allows the death penalty for children 16 and 17 years of age who are convicted of a capital crime. KRS 640.040. Juveniles who commit serious crimes can also be held accountable under current Kentucky law in significant ways. A juvenile is subject to life without the possibility of parole for 25 years for capital offenses or life imprisonment without the possibility for parole for 20 years.



The Summer 2002 Kentucky Survey conducted by the U K Survey Research Center surveyed 882 Kentuckians 18 years of age or older from July 20 to August 26, 2002 and included the following question:

Currently in Kentucky, if a 16 or 17 year-old is convicted of aggravated murder, they can be given one of the following sentences: The death penalty, life in prison without the possibility of parole, life in prison without the possibility of parole for 25 years, life in prison without the possibility of parole for 20 years, or 20 to 50 years in prison without the possibility of parole until at least 85% of the sentence is served. A bill to eliminate the death penalty option for 16 and 17 year olds will be introduced in the next General Assembly. This bill would keep all of the other sentencing options but NOT allow a 16 or 17 year-old to be sentenced to death. Would you favor or oppose this bill? (Is that strongly or somewhat favor/oppose?)



The margin of error for the survey is +/- 3.3% at the 95% confidence level.

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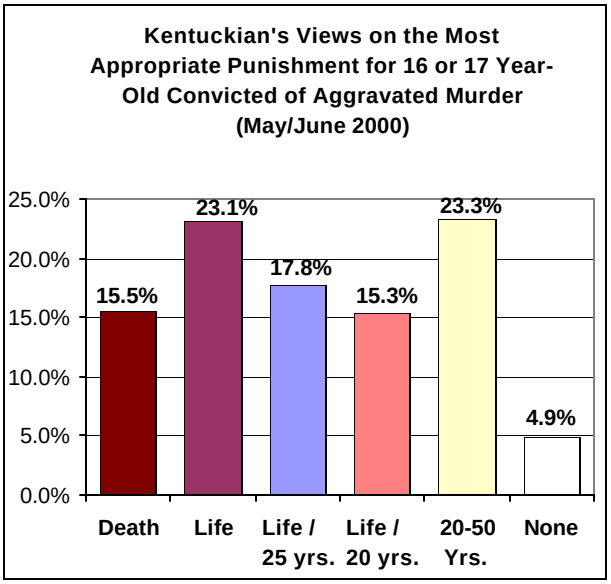

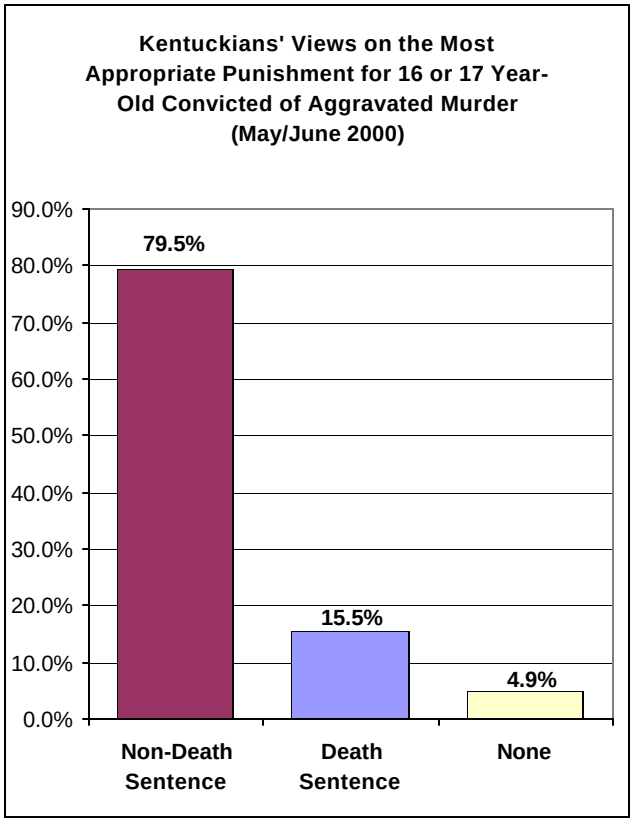

Question asked by the UK Survey Research Center's *Spring 2000 Kentucky Survey* of 1,070 Kentuckians 18 years of age or older from May 18 - June 26, 2000. The margin of error is ± 3% at the 95% confidence level. Households were selected using random-digit dialing, a procedure giving every residential telephone line in Kentucky an equal probability of being called.

An overwhelming number of Kentuckians believe that juveniles should not be executed. 79.5% of those polled in the state who gave an answer said that the most appropriate punishment for a juvenile convicted of an aggravated murder in Kentucky was a sentence other than death. Only 15.5% of Kentuckians believe that death is the most appropriate penalty for a juvenile who is convicted of an aggravated murder. There were 4.9% who responded that they didn't know. *The Spring 2000 Kentucky Survey*, which surveyed 1,070 Kentuckians 18 years of age or older from May 18 – June 26, 2000 and was conducted by the UK Survey Research Center, asked the following question and had the following answers:

If a 16 or 17 year-old is convicted of aggravated murder, which of the following punishments do you personally think is MOST appropriate:

The death penalty 15.5
Life in prison without the possibility of parole forever 23.1
Life in prison without the possibility of parole for 25 years 17.8
Life in prison without the possibility of parole for 20 years, or 15.3
20 to 50 years in prison without the possibility of parole until at least 85% of the sentence is served 23.3
None of the above (volunteered) 4.9

In December 1989, the Urban Research Institute of the University of Louisville conducted a statewide poll to determine attitudes in the state of Kentucky on death penalty items, one of which is the matter of executing juveniles. After asking participants about their feelings about the use of the death penalty for persons convicted of murder , the following question was asked: "What if the convicted person was a youth under 18 years of age?" Less than half, 42%, favored execution; 22% replied they were not sure; and 36% opposed the execution of youth for crimes committed under the age of 18. ■ **Ed Monahan**

Achieving goals of peace, freedom, human rights, environmental quality, alleviation of suffering, the Rule of Law

During the past decades, the international community, usually under the auspices of the United Nations, has struggled to negotiate global standards that can help us achieve these essential goals. They include: ....prohibition of the death penalty, at least for children….

— Jimmy Carter, Nobel Acceptance Speech

ABA Report on Representation of Juveniles in KY

Together with the American Bar Association Juvenile Justice Center, the Children's Law Center released "*Advancing Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*," a year long study conducted to determine whether poor children in the Commonwealth have access to quality representation, and to examine the systemic barriers to effective advocacy. It is the second study of its kind in Kentucky, the first having been released by the Children's Law Center in 1996. The earlier report detailed a defender system riddled with financial difficulties, resulting in large numbers of youth being unrepresented, or represented by attorneys who lacked training in juvenile matters, or whose caseloads were too high to provide meaningful advocacy for their clients.

The new report highlights the efforts of Kentucky's three branches of government to address systemic reforms in juvenile justice, including the enhancement of defender services to children who are indigent. It reflects advancement toward the basic principles of justice, yet identifies areas where continued improvement is necessary to reduce systemic barriers to effective representation.

"Clearly, the report shows that the state has made steady advances toward ensuring that poor children have representation at critical stages, particularly when they are charged with more serious offenses, " says **Kim Brooks**, the study's principal author. "The clear message, however, is that the work is not yet done to level the playing field, and that those advances made by the current administration must be sustained."

Among the most significant findings in the study are the following:

- The 2000 General Assembly passed the Governor's budget with the stated increases for DPA at $4 million in FY 2001 and $6 million in FY 2002. This has helped to new open offices, reduce defender caseloads, expand appellate capacity, and increase salaries for DPA attorneys.
- Since 1996, DPA has created several new trial offices, replacing the contract system in several parts of the state. In 1996, the Department of Public Advocacy covered forty-seven counties with a total of seventeen field offices. By December of 2001, this number grew to twenty-three field offices covering 102 counties. Three other full-time offices, located in Boyd, Fayette and Jefferson Counties, are operated by separate non-profit entities, bringing the total number of counties covered by full time offices to 105.
- While average caseloads have been reduced for trial attorneys statewide, some counties report juvenile cases far in excess of standards Effective representation is adversely effected in some parts of the state due to crushing caseloads, court docketing, and geographic challenges in multi-county offices.
- Interviews with youth in facilities indicate that with few exceptions, most have been represented by counsel for the charges leading to their incarceration. Interviews with youth and families in the community during site visits, however, revealed that waiver of counsel was more prevalent among those non-detained youth. In spite of legislation and case law to the contrary, it is clear that large numbers of youth are still waiving counsel without the appropriate procedural safeguards in place.

Kim Brooks

- Post-disposition advocacy for youth in treatment facilities and other residential settings, as done by the Juvenile Post-Disposition Branch, appears to be highly effective in addressing individual clients needs as well as systemic change. More post-disposition advocacy services should be available through trial offices, however, particularly when youth are not incarcerated.
- There has been a significant rise in the number of appeals filed on behalf of juveniles, as well as other forms of extraordinary relief such as writs of *habeas corpus.*
- There are significant inconsistencies in the representation of status offenders, both as to appointment of counsel, as well as quality of representation. In some areas, for example, public defenders are not appointed at all, but rather the courts utilize guardians *ad litem.*
- While Kentucky's juvenile detention facilities are not generally overcrowded beyond capacity, (and indeed are under capacity often) the assessment concluded that detention is over-utilized in some cases for youth who could be effectively served in less restrictive and more effective programming. This was particularly true for status offenders and youth being held in contempt of court.
- Defenders are challenged by the erosion of confidentiality for youth in the juvenile justice system, as well as the flow of information between courts, juvenile justice workers and schools. It appears that schools have a direct line to judges in some areas without any concern for the due process rights of students and other procedural safeguards afforded through the Kentucky Juvenile Code.
- Defenders are challenged by a system where youth with significant mental health and disability needs are prevalent, yet comprehensive community based mental health, substance abuse and other treatment options are often scarce and "cookie cutter" in their approach.
- Minority youth are over-represented in nearly every aspect of Kentucky's juvenile justice system, from arrest to transfer to incarceration. Defenders in some parts of the

Continued on page 10

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state face particular challenges in securing this data, identifying possible disparities, and advocating for policies and practices that may reduce these disparities.

- Likewise, the growing number of Hispanic youth and families in Kentucky present challenge to the defender community that must be effectively addressed through programs of cultural awareness, diversity in defender staff, and access to translators and Spanish speaking personnel.
- The availability of the death penalty for youth who commit certain offenses in Kentucky continues to have a crushing effect on resources for those attorneys handling such cases, and such penalty continues to exist in spite of legislative attempts to abolish it as many states have done.
- The emergence of "zero tolerance" policies and the criminalization of school-based conduct are widespread in Kentucky courts in spite of the continued decline in problematic school behavior. This is particularly troublesome in that minority children and youth with disabilities tend to suffer the most severe consequences in school disciplinary actions.
- The increasing number of females in the juvenile justice system the question as to whether such growth is due in part to an increase in violent behaviors, or whether it is due to the re-labeling of girls' family conflicts as violent offenses, changes in police practices regarding domestic violence and aggressive behavior, gender bias in the processing of misdemeanor cases, and perhaps a fundamental systemic failure to understand the unique developmental issues facing female offenders.

Upon reviewing the Report, Public Advocate Ernie Lewis said, "I hope that all defenders take pride on the immense progress that has been made in the quality of representation of Kentucky's children during the past 6 years. We must take to heart the Findings and Recommendations contained in this ABA Report and make the next 6 years just as productive in improving our system. Thanks to the ABA, Kim Brooks and her Center for their excellent study and report, and to all who participated in it. I have appointed DPA Trial Division Director David Mejia in whose Division over 17,000 juvenile clients are represented, Post-Trial Division Director Rebecca DiLoreto in whose Division clients are represented who are in a juvenile facility and Jeff Sherr, Manager of DPA's Education Branch that develops and produces DPA's regional juvenile Summits, the juvenile litigation track at our annul Persuasion Institute and at our Annual Conference to co-chair a Task Force on the implementation of the recommendations in "Advancing Justice: An Assessment of Access to Council and Quality of Representation in Delinquency Proceedings." They will gather a task force that hopefully will include Kim Brooks and other juvenile justice advocates to brainstorm ways to implement the ABA Report's recommendations , and to present your recommendations to the DPA Leadership Team for action. One of the DPA Task Force primary tasks will be to explore what DPA can accomplish both within our existing resources, particularly in collaboration with other individuals or groups, and what we can only accomplish with additional resources over the long-term."

The full report is found at: http://www.abanet.org/crimjust/juvjus/kentuckyhome.htm ■

DPA Stanton Office Moves to Professional Space

The Stanton Office of the Department of Public Advocacy celebrated its move to newer, more professional office space on December 10, 2002. Its new location is 452 Washington Street in Stanton. The office coverage area includes the counties of Breathitt, Estill, Lee, Owsley, Powell and Wolfe.

On hand for the ceremony were Court of Appeals Judge Sara Combs, District Court Judge Kenneth Proffitt, Public Advocate Ernie Lewis, and a host of dignitaries and office staff.

Public Advocate Ernie Lewis opened the ceremony by stating that this office had come a long way in the last twenty years and that it has always been his desire to have all Department staff in professional office settings and this is one more we can celebrate. Judge Sara Combs said that "I am so glad to see that you have a proper place from which to practice. Your clients will feel more comfortable and take more pride in coming here. From the beginning, I thought the most wonderful thing to do with a law degree is to help the downtrodden. We have an obligation to use our superb training to help those that have no hope. You honor me by asking me to be present today. I know of no finer group of lawyers."

Stanton District Court Judge Kenneth Proffitt thanked the staff for representing the indigent of Powell County and commended the

Public Advocate Ernie Lewis with the Stanton Office Staff

Public Advocate for the decision to keep and maintain an office in Stanton. He also thanked the members of the staff for committing part or all of their careers to public service.

Service recognition awards were presented to Robert King, Patrick O'Neill and Thomas Hollon for their continued public defender service to the courts of Breathitt, Estill, Lee, Owsley, Powell and Wolfe Counties.

The Kentucky Bill of Rights was presented to office staff which include Directing Attorney Bill Burt, staff lawyers Bruce Fransiscy, John Nelson, Lisa Hayden and Andrea Williams, secretaries Bridget Whisman and Rita Creech, and Investigator Gary Sparks. ■

Debbie Garrison

AOC/DPA Workgroup Meets and Makes Important Findings and Recommendations

A Focus on Eligibility Findings and Recommendations to Insure DPA Appointed to Only Those Who are Indigent

Ed Monahan

The Blue Ribbon Group for Improving Indigent Defense for the 21st Century (BRG) recommended that the Court of Justice, the Administrative Office of the Courts and the Department of Public Advocacy work together to insure appropriate public defender appointments in its Recommendation No. 11: "Public Defender Services are Constitutionally Mandated while Resources are Scarce. It is Important for all Eligible Persons who want to be Represented by a Lawyer, but only those who are Eligible to be Appointed a Public Defender. The Court of Justice, and Especially AOC and DPA are Encouraged to work Cooperatively to Ensure Appropriate Public Defender Appointments."

The BRG had a broad cross-section of Kentucky Criminal Justice leaders, including, the Chief Justice, the former Chief Justice as Co-chair, a District Court Judge and a Commonwealth Attorney. Public Advocate Ernie Lewis and AOC Director Cicely Lambert formed an AOC/DPA Workgroup to implement Recommendation No. 11. At AOC's request, pretrial release was added to the Workgroup's agenda.

The Workgroup consisted of significant leaders in the Court of Justice, AOC and DPA. It included 6 district court judges. Members of the AOC/DPA Workgroup were: Cicely Lambert, Melinda Wheeler, Ed Crockett, Mike Losavio, Jacquie Heyman, Judge George Davis, Judge Mike Collins, Judge Carl Hurst, Judge Bruce Petrie, Judge John Knox Mills, Judge William P. Ryan (Judge Deborah DeWeese in his absence), Ernie Lewis, Judy Campbell, Ed Monahan, Jim Cox, Lynda Campbell, Scott West, Rob Sexton, Joseph Barbieri, Dan Goyette, and George Sornberger.

The AOC/DPA Workgroup met 5 times during late 2001 and early 2002 for over 12 hours of discussions, and has made significant Findings and Recommendations. We focus in this article on several Eligibility Findings and Recommendations related to insuring that DPA is appointed to represent only those clients who are genuinely indigent:

Eligibility Findings. There were 19 Eligibility Findings made by the Workgroup. We focus on 6 of the Eligibility Findings:

- ❑ The eligibility determination is a vital stage of criminal proceedings. There is an inherent tension at this stage between the need for uniformity among all courts and the retention of discretion by the judge. It is important that the decision to appoint counsel or not be made by a judge using his/her informed discretion and utilizing sufficient facts to make a reasonable decision.
- ❑ Neither the under-appointment nor the over-appointment of public defenders is a responsible use of public resources.
- ❑ The timing of the filling out of the affidavit of indigency can effect significantly the quality of the information in the affidavit.
- ❑ There is no mechanism in place at the current time to verify information on the affidavit of indigency. Further, there is no method in place to notarize the affidavit or provide necessary assistance to defendants in completing the form.
- ❑ Pretrial release officers do not now interview juvenile clients, and thus affidavits of indigency are not being completed for most juveniles. Juvenile judges through the use of questioning are making eligibility determinations.
- ❑ DPA directing attorneys, heads of urban offices, and contract administrators are in a unique position to communicate with judges regarding any perceived problems with the appointing practices and procedures in particular courts.

Eligibility Recommendations. There were 12 Eligibility Recommendations made by the Workgroup. We focus on 3 of the Eligibility Recommendations:

- ❑ The affidavit of indigency or an equivalent verbal colloquy should be required prior to appointment of a public defender whether the individual is in custody or on pretrial release and whether the person is an adult or a juvenile. Each jurisdiction should develop a protocol for bringing to the attention of the judge the affidavit of indigency.
- ❑ The affidavit of indigency should be prepared at an interview when the defendant is not under the influence of alcohol or drugs or otherwise unable to rationally participate in the interview.
- ❑ A mechanism should be in place to verify financial information when requested by the Court. In order to provide these services, the Pretrial Service Agency will need additional resources.

Implementing the Recommendations. If the Recommendations are to become reality, it will require the criminal justice system to make changes. Judges, prosecutors, pretrial release officers, and defenders will have to work to make the Recommendations work.

In the conclusion of its Report, the Workgroup called for: "The AOC/DPA Workgroup urges implementation of these Eligibility and Pretrial Release Recommendations for the benefit of the Kentucky Criminal Justice System and the people of Kentucky." Some changes have already taken place.

With changes to KRS 31.120, the 2002 General Assembly improved the factors a judge shall consider in determining whether a person is indigent or partially indigent and able to pay a partial fee. AOC has upgraded the affidavit of indigency, AOC-350, in light of the AOC/DPA Workgroup eligibility Recommendations and the changes to KRS Chapter 31. The affidavit now has a fuller set of financial information for the judge to review. It includes an order that requires the judge to determine if a partial fee is appropriate for a person who has counsel appointed for him.

Public Advocate Ernie Lewis said, "One of the critical stages of the criminal justice process for the indigent accused is that time when he or she is appointed counsel. Only with a vigorous defense can the indigent accused receive due process. It is equally critical that only those persons who are genuinely indigent receive appointed counsel. We must be good stewards of public funds. That's what makes the work of the AOC/DPA Workgroup so essential. The Findings and Recommendations go far toward ensuring that due process is accorded the indigent accused while at the same time guaranteeing that public moneys are being used responsibly." ■

Ed Monahan, Deputy Public Advocate

DPA's Stanford Office Moves to Danville

Senator Tom Buford at the Danville Opening

The Department of Public Advocacy's Stanford Office previously located on Main Street in Stanford has moved to newer and bigger office space in Danville. On October 18, 2002, the office celebrated the opening of its new location. The office now located at 438 West Walnut Street in Danville houses six lawyers and three support staff and covers the counties of Garrard, Jessamine, Mercer, Boyle and Lincoln.

Present at the reception were State Senator Tom Buford, Mercer Bar Association President Jeff Dotson, Public Advocate Ernie Lewis, DPA Trial Division Director David Mejia, Office Directing Attorney Suzanne McCullough and a host of local and state dignitaries and office staff.

Tom Buford noted that this office had come a long way from being housed in a reformatory. He stated that it pleased him to see that the office staff can now be proud of their surroundings and of the work they do as public servants.

Jeff Dotson, on behalf of the Mercer County Bar Association, welcomed the office to Danville and stated that he looked forward to their presence in the courts.

Service recognition awards were presented to J. Thomas Hensley, David Patrick, James B. Sparrow, and Scott Staples for past public defender service to the courts of Garrard, Jessamine, Mercer, Boyle and Lincoln Counties, at a time when full-time lawyers were not an option to cover the courts.

The Kentucky Bill of Rights was presented to the staff which consists of Directing Attorney Suzanne McCullough, Staff Lawyers Jenny Sanders, Ted Dean, Stacy Coontz, Margaret Case and Karen Mead, Secretaries Connie Armentrout and Sue Brewer, and Investigator Bob Rehburg. ■ **Debbie Garrison**

Ribbon cutting at the Danville Opening: (l to r) Mercer Bar Association President Jeff Dotson, Trial Division Director David Mejia, Public Advocate Ernie Lewis, Senator Tom Buford, and Directing Attorney Suzanne McCullough

Legislative Update
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